UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte CHET M. CRUMP and EDWARD B. MADSEN

Appeal No. 2005-1299
Application No. 09/716,486

ON BRIEF

Before FRANKFORT, MCQUADE and NASE, Administrative Patent Judges.

Per Curiam

DECISION ON APPEAL

Chet M. Crump et al. appeal from the final rejection of claims 1 through 12, all of the claims pending in the application.

THE INVENTION

The invention relates to a respiratory suction apparatus which is defined in representative claim 1 as follows:

1. A respiratory suction apparatus comprising:
a suction catheter for removing fluids from a respiratory tract of a patient by insertion of a distal end of the catheter into said respiratory tract and withdrawal of the distal end of the catheter through a portion of said tract while applying negative pressure to a lumen of the catheter;
a protective sleeve surrounding a proximal longitudinal portion of the catheter;

a distal adapter configured for communication with a manifold of a patient's artificial airway;

a collar disposed within the adapter and partially surrounding the distal end of the catheter when the catheter is withdrawn from the manifold, the collar and the catheter defining a substantially uniform cylindrical space around a distal portion of the catheter, the cylindrical space capable of directing lavage solution into the adapter;

a valve device configured in the adapter to substantially isolate the catheter from the manifold upon withdrawing the distal portion of the suction catheter from said manifold and applying suction through the catheter lumen, said valve device being opened by advancement of said suction catheter through said valve device; and

a lavage port in fluid communication with the cylindrical space defined by the collar and the catheter, the lavage port in fluid communication with the patient's artificial airway through the cylindrical space and the adapter.

THE PRIOR ART

The references relied on by the examiner to support the final rejection are:

Loescher et al. (Loescher)	5,005,568	Apr. 09, 1991
Niermann et al. (Niermann)	5,354,267	Oct. 11, 1994
Reynolds	5,370,610	Dec. 06, 1994
Russo	5,775,325	Jul. 07, 1998

THE REJECTIONS

Claims 1 through 7, 10 and 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Niermann in view of Russo.

Claims 8 and 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Niermann in view of Russo and Reynolds.

Claim 9 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Niermann in view of Russo, Reynolds and Loescher.

Attention is directed to the main and reply briefs (filed February 4, 2004 and May 5, 2004) and answer (mailed March 4, 2004) for the respective positions of the appellants and examiner regarding the merits of these rejections.

DISCUSSION

I. The 35 U.S.C. § 103(a) rejection of claims 1 through 7, 10, and 11 as being unpatentable over Niermann in view of Russo

Niermann discloses an "irrigation and suction apparatus for use during ventilating of a patient" (column 1, lines 6 and 7). As seen in Figure 1, the apparatus 10 comprises a suction catheter 18, a protective sleeve 20 that substantially surrounds the catheter, a front coupling 14, a rear coupling 12, a three-way stopcock or valve 16 that includes a cylindrical housing 30 and a rotatable interior disk-like member 32, a fluid input port 40 integrally formed with the cylindrical housing 30, and a one-way duckbill valve 74 in the passage between the stopcock and the front coupling. Niermann teaches that the stopcock may be

rotated into three positions. One position (see Figure 1) allows the catheter to move through the stopcock 16 and past valve 74 into the artificial airway. A second position (see Figure 2) allows the fluid from port 40 to clean the catheter but blocks the fluid from reaching the patient. In this position, the catheter is blocked from entering the artificial airway. A third position (see Figure 3) permits the fluid from port 40 to reach the patient but blocks the fluid from contacting the catheter. As is the case with the second position, the catheter is blocked from entering the artificial airway in the third position. The foregoing structure reflects Niermann's desire for an apparatus that

> directs irrigation fluid solely to the patient's trachea in one step of operation, in another step of operation directs the irrigation fluid solely to the catheter to flush the internal catheter lumen and to flush or force any material lodged in the lumen, such as mucous, away from the patient, and in another step of operation provides suctioning to the patient [column 1, line 68, through column 2, line 6].

In applying Niermann against independent claims 1 and 10 (see pages 3 and 4 in the answer), the examiner reads the limitations in these claims relating to the suction catheter, distal adapter, collar and lavage port on Niermann's suction catheter 18, three-way stopcock 16, rotatable interior disk-like

member 32 and fluid input port 40, respectively. The examiner acknowledges (see page 4 in the answer), however, that Niermann lacks response to the limitations in these claims requiring the lavage port to be in fluid communication with a patient's artificial airway through a cylindrical space defined between the distal end of the catheter and the collar. To supply this deficiency, the examiner turns to Russo.

Russo discloses a closed tracheal suction device that permits suctioning and irrigation of a patient's airway without having to disconnect an associated ventilator circuit. As seen in Figure 5, the device comprises a suction catheter 44, a manually deformable entry valve 27 which cannot be opened by the catheter, a port assembly 17 in front of the valve for administering liquid to a patient and a port assembly 38 behind the valve for flushing the catheter.

In proposing to combine Niermann and Russo to reject claims 1 and 10, the examiner submits that it would have been obvious "to have taken the features of Russo and used them with the device of Niermann" (answer, page 4). The examiner goes on to explain that Russo is cited to provide motivation to use the Niermann apparatus in a manner which would meet the claim limitations in question:

> Niermann . . . uses a ball valve (16) that has a "T" connection that Niermann discusses three of four positions such a "T" connection ball valve would have. Please note that the valve possesses no illustrated or disclosed physical impediments to placing the valve in a fourth position. The fourth position that is not discussed by Niermann would be the same as the positioning illustrated in Figure 1 to permit the longitudinal positioning of the catheter (The top of the "T"), but the stem of the "T" would be in line and fluid communication with the lavage port (40). The end result of this positioning would be the lavage port positioned to be in fluid communication with the annular space between the suction catheter and the adaptor when the suction catheter is present [answer, page 10].

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention absent some teaching, suggestion or incentive supporting the combination. In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783-84 (Fed. Cir. 1992). The mere fact that the prior art may be modified in the manner suggested by an examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. Id.

In the present case, the disparate teachings of Niermann and Russo would not have motivated a person having ordinary skill in the art to use the three-way stopcock of Niermann in an undisclosed "fourth position." To begin with, Russo offers no motivation or suggestion to modify the Niermann apparatus in the

manner proposed. Moreover, Niermann teaches that the three-way stopcock has just the three disclosed positions (see, generally, column 5, lines 13 through 57) to achieve the above noted objective of introducing irrigation fluid solely to the patient and solely to the catheter in separate steps. Hence, Niermann teaches away from the proposed modification in view of Russo. The combined disclosures of these references clearly do not justify the examiner's conclusion that the differences between the subject matter recited in claims 1 and 10 and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of independent claims 1 and 10, and dependent claims 2 through 7 and 11, as being unpatentable over Niermann in view of Russo.

II. The 35 U.S.C. § 103(a) rejection of claims 8 and 12 as being unpatentable over Niermann in view of Russo and Reynolds

As the examiner's application of Reynolds does not cure the above noted shortcomings of Niermann and Russo relative to the subject matter recited in parent claims 1 and 10, we shall not sustain the 35 U.S.C. § 103(a) rejection of dependent claims 8

and 12 as being unpatentable over Niermann in view of Russo and Reynolds.

III. The 35 U.S.C. § 103(a) rejection of claim 9 as being unpatentable over Niermann in view of Russo, Reynolds and Loescher

As the examiner's application of Reynolds and Loescher does not overcome the above noted deficiencies of Niermann and Russo relative to the subject matter recited in parent claim 1, we shall not sustain the 35 U.S.C. § 103(a) rejection of dependent claim 9 as being unpatentable over Niermann in view of Russo, Reynolds and Loescher.

SUMMARY

The decision of the examiner to reject claims 1 through 12 is reversed.

REVERSED

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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JOHN P. MCQUADE) BOARD OF PATENT
Administrative Patent Judge) APPEALS
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) INTERFERENCES
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